

Prepared Testimony
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Legislative Options for Congress Regarding the Proposal for Full U.S.-Indian Nuclear Cooperation

Mr. Chairman, thank you for the opportunity to testify before the Committee on International Relations on options regarding the Bush administration's proposal to resume full civil nuclear cooperation with India.

In the ten months since this element of the U.S.-India Partnership was first outlined, discussion and debate has appropriately focused on whether it enhances or undermines U.S. and global efforts on what is arguably the single most important national security challenge: preventing the spread and growth of nuclear weapons worldwide.

As Congress considers options regarding the administration's legislative proposal and other proposals that put forward by House members, it is important to put the issue in proper context.

For the better part of four decades, India has chosen to remain outside the nuclear nonproliferation mainstream. While advocating the general goal of nuclear disarmament, Indian leaders have shunned the nuclear Nonproliferation Treaty (NPT) since its inception in 1968. Six years after this treaty's negotiation, India deliberately and inappropriately used U.S. and Canadian nuclear imports designated for peaceful purposes to explode a nuclear device. Since that test, India surreptitiously built up a nuclear weapons stockpile, refused to subject all but a handful of its nuclear facilities to outside inspection, and defiantly conducted a series of nuclear tests in May 1998 just two years after the international community concluded the Comprehensive Test Ban Treaty (CTBT).

Over the years, Republican and Democratic administrations have pursued policies and standards designed to deny India and other states outside the NPT access to nuclear weapons-related technology, and to encourage them to restrain the growth and development of their nuclear arsenals. These policies have helped limit India's nuclear weapons capabilities.

While the United States and other NPT states have formally called upon India to join the NPT as a non-nuclear-weapon state, it is evident that U.S. laws and Nuclear Suppliers Group (NSG) trade barriers will not likely bring India into the NPT or induce it to give up its nuclear weapons any time soon. In response, United States and other countries have, with some success, sought to bring India—and the two other NPT outliers Israel and Pakistan—into line with the nuclear nonproliferation and arms control practices of NPT member states. Only eight years ago, in June 1998, the UN Security Council adopted Resolution 1172, which calls upon India and Pakistan to immediately stop their weapon development programs, halt fissile material production for weapons purposes, and to sign the CTBT, among other nonproliferation measures.

Supporters of the proposal for civil nuclear cooperation with India claim that it is time to make an exception to the nonproliferation rules for a state with which the United States has strong ties. Many of them assert that the nuclear cooperation arrangement will help India significantly expand energy production, foreign nuclear fuel imports would not indirectly improve India's capacity to produce fissile material for nuclear weapons, and India's acceptance of International

Atomic Energy Agency (IAEA) safeguards on an additional eight nuclear reactors by 2014 is a major nonproliferation gain that helps bring India into the nuclear nonproliferation mainstream. Some even suggest that approval of this nuclear cooperation arrangement is a litmus test of Indo-U.S. relations.

However, I along with most other experts in the nonproliferation field and even some supporters of the nuclear cooperation proposal, agree that the arrangement does not bring India into the nonproliferation mainstream, but instead weakens and ignores nonproliferation standards that have been championed by the United States for decades. I also believe that it is a mistake to frame the debate about the nuclear cooperation proposal as a test of Congressional support for better relations with India. The U.S.-Indian relationship is already strong and will, in the long run, grow stronger whether or not the proposed nuclear cooperation arrangement is approved, delayed, or modified.

The value of the nonproliferation commitments outlined in the July 18 Joint Statement has been oversold by proponents. The arrangement fails to constrain and may indirectly assist the growth of India's nuclear arsenal and it risks serious damage to other vital U.S. nuclear nonproliferation goals and multilateral endeavors, including the NSG and the NPT itself.

It would also be a mistake to believe that Congress must act quickly in order to provide civil nuclear assistance to India, especially given that the U.S. nuclear industry is reticent to pursue trade deals with India until it joins key international civil nuclear liability agreements, which establish terms for operator liability for damages caused by accidents.

This is an important matter that requires careful consideration, a thorough evaluation of all the options, and a solution that balances key nonproliferation, trade, energy, and security priorities.

As this Committee considers options regarding the administration's legislative proposal, H. R. 4974 that would amend the 1954 Atomic Energy Act (AEA), as well as the required AEA Section 123 agreement for nuclear cooperation that is now being negotiated with India, it has an important opportunity to help correct the nonproliferation shortcomings of the proposal.

I respectfully urge you to pursue the several practical and common sense legislative options that could mitigate adverse impacts on the nonproliferation regime and improve India's nonproliferation and disarmament behavior in ways that would help strengthen long-term U.S. and international security.

My main recommendations can be summarized in five main points.

First, Congress should establish additional and more meaningful conditions for responsible nonproliferation behavior by India in order for it to receive full civil nuclear cooperation with the United States. Chief among these would be for Congress to require the President to certify that India is no longer producing fissile material for nuclear weapons purposes, or has entered into a multilateral arrangement to stop fissile material production for weapons purposes, or has joined a global verifiable fissile material production cutoff treaty. Congress should also require the President to certify annually that no form of civil nuclear assistance from the United States to India is being used directly or in any other way to assist India's nuclear weapons program.

Second, Congress should approve additional conditions that would help ensure that IAEA safeguards, including the Additional Protocol, on civil nuclear facilities in India are consistent

with IAEA practices and are signed and enter into force prior to the implementation of the civil nuclear cooperation agreement.

Third, Congress should preserve its existing authority and decide to review and consider the proposed Section 123 agreement for nuclear cooperation with India as an “exempt” agreement. Furthermore, Congress should not act on proposed amendments to the Atomic Energy Act until it has reviewed the details of the proposed bilateral agreement for nuclear cooperation with India and the Indian-IAEA safeguards agreements.

Fourth, as is the practice with other bilateral agreements for nuclear cooperation and as required in Section 129 of the AEA, Congress should identify which negative nonproliferation actions, if undertaken by India, could trigger the termination of U.S. civil nuclear cooperation. These should track with existing law as closely as possible and seek to ensure that India meets the commitments it has made in the July 18, 2005 Joint Statement and elsewhere.

Fifth, Congress should ensure that proposed changes to NSG guidelines do not undercut U.S. law or policy objectives, and the U.S.-Indian nuclear cooperation agreement should not be implemented until the NSG approves by consensus the changes to its guidelines necessary to allow full civil nuclear cooperation with India.

A more detailed explanation of these and other recommendations follows below.

1. Improve and Clarify the Conditions for Responsible Nonproliferation Behavior Required for Full Civil Nuclear Cooperation with India

In my judgment, any proposal to make sweeping exceptions to longstanding nonproliferation rules for any country, for any reason, must, on balance, deliver exceptional and demonstrable nonproliferation and international security benefits and guard against unintended negative security consequences. The presidential determinations proposed by the administration in H.R.4974 and the commitments outlined in the July 18 Joint Statement do not meet this test.

The proposed U.S.-Indian nuclear cooperation arrangement is premised on the idea that India is prepared to “assume the same responsibilities and practices” as other nuclear-weapon states. Unfortunately, the existing terms of the proposal would not oblige New Delhi to undertake the same practices as the five original nuclear-weapon states, including a halt of production of fissile material for weapons and signature of the CTBT. Nor would it commit India to support an “early cessation of the nuclear arms race” and disarmament, as Article VI of the NPT requires of its members.

Restraints on Fissile Material Production for Weapons Purposes

The most significant shortcoming of the proposal is its failure to win any meaningful commitment from India to curtail production of fissile material (i.e. plutonium and highly enriched uranium) for weapons purposes, which has been a longstanding U.S. policy goal. Such a step would help cap the growth of India’s arsenal and curb nuclear arms competition in Asia.

Four of the five original nuclear-weapon states—France, Russia, the United Kingdom, and the United States—have all publicly and unilaterally declared a halt to fissile material production for

weapons. China is also believed to have stopped fissile material production for weapons in order to focus on the production of nuclear fuel for energy purposes.

The July 18 Joint Statement affirms India's support for the negotiation of a global fissile material cutoff treaty (FMCT). This is a positive statement but it is not a new pledge.

India has for several years stated its support for the negotiation of a global, verifiable FMCT, but negotiations toward such a treaty have been deadlocked since the late 1990s due to differences over negotiating priorities. The current impasse is primarily the result of U.S. opposition to the negotiation of a *verifiable* treaty and to discussions on other arms control topics at the 65-nation Conference on Disarmament. Ironically, India has stated that it would only support a verifiable FMCT.

Until such time as the U.S. government adjusts its position and negotiators resolve differences over verification and other issues, the realization of the FMCT will remain a distant goal and India's FMCT pledge will remain an empty gesture. Likewise, H.R. 4974's requirement that the President determine that "India is working with the United States for the conclusion of a multilateral Fissile Material Cutoff Treaty," has little or no practical value.

The absence of an Indian commitment to halt or otherwise constrain its fissile material production is troublesome for another reason: even if India's civilian-military separation plan is deemed "credible" and all facilities declared civilian are placed under permanent IAEA safeguards, the supply of foreign nuclear fuel to India could still free-up India's existing and somewhat limited capacity to produce plutonium and highly enriched uranium for weapons. This could allow for the rapid expansion of India's nuclear arsenal from the current rate of some 6-10 bombs annually to several dozen annually.

Indeed, Indian nuclear hawks such as K. Subrahmanyam have openly argued that, in order to expand India's arsenal, New Delhi should "categorize as many reactors as possible as civilian" to facilitate foreign refueling and conserve India's scarce "native uranium fuel for weapon-grade plutonium production."¹

In its January 17, 2006 responses to questions from Rep. Markey about the possibility of imported nuclear fuel freeing up India's fissile material production capacity, the State Department does not deny the possibility and simply asserts that "the growth of India's nuclear program is evidently not constrained by access to natural uranium."²

The administration's approach does not take into account several scenarios that could allow India to use existing and relatively limited domestic uranium supply to support fissile material production for weapons purposes.

For instance, if India builds a new plutonium-production reactor (as it is reportedly planning to do³) or decides to use one or more of its eight existing heavy water reactors that were excluded from IAEA safeguards to augment its two existing military plutonium production reactors (CIRUS and Dhruva), the additional increased consumption of domestic uranium supplies for

¹ "India and the Nuclear Deal," by K. Subrahmanyam, *Times of India*, December 12, 2005.

² Letter from the U.S. Department of State to Congressman Edward Markey, January 17, 2006. Available at <http://www.armscontrol.org/pdf/20060117_India_Responses_Markey.pdf>.

³ See "Replication of Dhruva reactor proposed for next Indian economic plan," by Mark Hibbs, *Nuclear Fuel*, May 8, 2006.

plutonium production would be compensated for by access to imported uranium for safeguarded power reactors.

And, if India no longer needs to rely on domestic uranium to fuel its power reactors, it could also expand its small-scale centrifuge enrichment program to make highly enriched uranium to support nuclear weapons production.⁴

Indian officials have refused to define what its policy of a “minimal credible deterrent” means and have suggested that India’s future strategic requirements may change. Nevertheless, the administration is apparently gambling that India’s future fissile material production goals will not significantly increase and that a future Indian government will not choose to define India’s nuclear deterrent requirements in a way that calls for more rapid fissile production.

While it is certainly not the intention of the administration to aid India’s bomb program, the issue is not one of just intent. It is also a legal matter. Article I of the NPT obligates the recognized nuclear-weapon powers, including the United States, to “not in any way to assist, encourage, or induce any non-nuclear weapon State to manufacture or otherwise acquire nuclear weapons or other nuclear explosive devices, or control over such weapons or explosive devices.”

In addition, UN Security Council Resolution 1172 also commits all UN member states “to prevent the export of equipment, materials or technology that could in any way assist programmes in India or Pakistan for nuclear weapons or for ballistic missiles capable of delivering such weapons....”

Still, some may question why the United States should care if India produces more fissile material for nuclear weapons and increases its nuclear capabilities. Indeed, some advocates of the proposed nuclear cooperation deal are blunt in saying that such a buildup should be of no concern to the United States and would actually be desirable. Ashley Tellis, for instance, wrote last summer, “Even if the United States cannot actively aid India in developing its strategic capabilities, it ought to pursue policies having exactly that effect.”⁵

I could not disagree more.

Engaging in nuclear trade with India while it maintains and exercises its options to expand its nuclear arsenal directly contradicts U.S. and global efforts to reduce nuclear weapons dangers. Today, one of the highest U.S. security priorities should be to reduce the number of nuclear weapons and amount of bomb-ready material susceptible to theft or misuse worldwide. Obviously, India’s continued production of both would thwart this critical objective. Unrestricted Indian fissile material and weapons production will make it more difficult for the United States to persuade Pakistan and India to slow or stop the growth of their nuclear weapons and fissile material stockpiles.

Tacit U.S. acceptance of a continued Indian nuclear arms buildup also would further complicate efforts to convince Iran and North Korea that nuclear weapons are unnecessary and not in their security interests. This is not to suggest that Iran and North Korea are pursuing nuclear weapons because India has nuclear weapons. Rather, it reflects an understanding that fewer countries

⁴ For further analysis, see: “Wrong Ends, Means, and Needs: Behind the U.S. Nuclear Deal with India,” by Zia Mian and M. V. Ramana, *Arms Control Today*, Jan./Feb. 2006.

⁵ Ashley J. Tellis., *India as a New Global Power*, Carnegie Endowment for International Peace, 2005, p. 36.

around the world are going to firmly support steps to deal with cases of noncompliance with nonproliferation standards of concern to the United States if it is perceived that the United States will ignore those standards in order to advance other U.S. national interests.

Although tensions on the subcontinent have eased in recent years, India and Pakistan remain locked in a nuclear arms race and their fingers remain on the nuclear trigger. The two nearly came to nuclear blows in 2002 and the risk of nuclear war lingers. Permitting India to pursue additional nuclear weapons only stirs this simmering, potentially explosive brew further.

The strongest guarantee that expanded civil nuclear trade with India would not contribute to its nuclear weapons program or stimulate further arms competition in Asia would be for Congress to require, as a condition for exempting India from the AEA section 123(a)(2) full-scope safeguards requirement, the President to certify that:

- India, as a matter of public policy, is no longer producing fissile material for nuclear weapons purposes, or has entered into a multilateral arrangement to stop fissile material production for weapons purposes, or has joined a global verifiable fissile material production cutoff treaty.

Indian officials, who are concerned about China's slow-moving nuclear modernization plan, have resisted suggestions that they unilaterally halt fissile material production for weapons purposes. Given that negotiations on an FMCT could take some time, Indian officials also resist tying civil nuclear trade to the completion of an FMCT.

However, given that the State Department continues to "call upon both [Pakistan and China] to also agree, as India has, to work toward a Fissile Material Cutoff Treaty" and says that "we stand ready to explore interim objectives,"⁶ it is realistic and practicable for the United States to encourage these three nuclear-armed states to achieve, as an interim objective and as a condition for the delivery of civil assistance to India, a regional fissile production cutoff arrangement pending completion of an FMCT.

Such an arrangement would help win necessary support from the Nuclear Suppliers Group to adjust its current guidelines and allow for civil nuclear cooperation with India. It would also help extract a major nonproliferation success out of an otherwise major nonproliferation loss.

Other alternative legislative conditions that might also be considered might allow for the the delivery of some forms of civil nuclear assistance, but withhold others pending a halt to Indian fissile material production for weapons purposes. For instance Congress could:

- Amend the AEA to permit the export of nuclear equipment, components and technology (with the exception of enrichment, reprocessing, and heavy water production facilities and technologies) to India provided the President certifies that India has voluntarily halted the production of fissile material for nuclear weapons purposes, or is actively promoting the negotiation of a multilateral, internationally verifiable Fissile Material Cutoff Treaty (FMCT) or a regional arrangement for stopping the production of fissile materials for nuclear weapons purposes.

⁶ Letter from the U.S. Department of State to Congressman Edward Markey, January 17, 2006.

When the President certifies to Congress that India has stopped the production of fissile material for nuclear weapons purposes, exports to India of nuclear material (i.e. fuel for reactors) may be authorized in accordance with the applicable regulations and provisions of U.S. law.

One theoretical alternative would be for Congress to amend the AEA to allow civil nuclear cooperation only if India and the United States seek to conclude negotiation of a global FMCT and/or conclude a regional arrangement for stopping the production of fissile materials for nuclear weapons purposes within a relatively short period of time (i.e. five years.). However, as the history of U.S. and international efforts to persuade India and other states to join in a multilateral fissile material production cutoff demonstrate, encouragement alone is not enough. Any such hortatory amendment would likely have little, if any, effect on producing the desired outcome.

Ensuring Civil Nuclear Cooperation Does Not Assist India's Weapons Program

Another complimentary approach to help ensure that U.S. nuclear assistance is not running afoul of Article I of the NPT by directly or indirectly assisting India's military nuclear program would be for Congress to require, as a condition for exempting India from the AEA section 123(a)(2) full-scope safeguards requirement, the President to certify on an annual basis that:

- No form of civil nuclear assistance from the United States to India is being used directly or in any other way to assist India's nuclear weapons program. Such assistance may include, but would not be limited to, the potential use of any U.S.-origin equipment, technology, or nuclear material by India in an unsafeguarded facility or nuclear-weapons related complex; or the replication and subsequent use of any U.S.-origin technology in an unsafeguarded nuclear facility or nuclear-related complex, or for nuclear weapons-related purposes.

As part of such a condition, Congress should also request an annual report by the executive branch to Congress regarding India's domestic production of uranium ore, nuclear reactor fuel, separated plutonium, and highly enriched uranium. It should also assess the net effect that foreign supplies of nuclear fuel for safeguarded civil purposes have on India's capacity to produce reactor fuel and fissile material in its unsafeguarded, military nuclear sector.

Such a requirement is consistent with U.S. commitments through the NSG and should not be controversial. In their responses to questions submitted on November 2 by Senator Lugar, Undersecretaries Burns and Joseph said: "We will also need to ensure that any cooperation is fully consistent with U.S. obligations under the NPT not to 'in any way' assist India's nuclear weapons program, and with provisions of U.S. law."

Nuclear Testing Limitations

The July 18 Joint Statement also reiterates India's commitment to maintain its moratorium on nuclear test explosions—a political pledge that it has made before in other contexts. All of the other original nuclear-weapon states are not only observing unilateral moratoria, but they have also signed the CTBT, which according to customary reading of Article XVIII of the Vienna Convention on Treaties, establishes a legally-binding commitment not to take any action

“contrary to the purpose or intent” of the treaty prior to ratification, which in the case of the CTBT is to ban nuclear test explosions of any kind.

While India has resisted joining the CTBT to date, it has stated that it will not be the last state to hold up its entry into force. It is also conceivable that India might join with Pakistan in a treaty pledging that neither will be the first to conduct a nuclear test explosion. To encourage India to actually assume the same responsibilities and practices expected of other nuclear-weapon states, Congress should require, as a condition for exempting India from the AEA section 123(a)(2) full-scope safeguards requirement, the President to certify that:

- India is making satisfactory progress toward a legally-binding commitment not to conduct nuclear weapon test explosions or nuclear explosions of any kind, and has not conducted a nuclear test explosion after May 1998.

None of the proposed presidential determinations in H.R.4974 address India’s nuclear test ban policy.

Safeguards on Civilian Nuclear Facilities

According to the July 18 Joint Statement and the civil-military separation plan announced by Prime Minister Singh, India has agreed to allow permanent IAEA safeguards on nuclear reactors and facilities that it designates as “civilian.” By the time the separation plan is to be implemented in 2014, as many as eight additional nuclear reactors would be safeguarded. Currently four reactors are already under facility-specific safeguards and India already agreed that two Russian-supplied light-water energy production reactors now under construction will also be safeguarded. Regarding future facilities, India has declared that it alone reserves the right to decide which facilities will be declared civilian and subjected to safeguards.

However, India’s civil-military separation plan excluded from IAEA oversight eight of its existing reactors, its breeder reactor program, its reprocessing and enrichment facilities, and all of its existing spent fuel. It should be recognized that partial IAEA safeguards in a state with a secret nuclear weapons program are far more symbol than substance.

In describing India’s civil-military separation plan in a statement to the Indian Parliament on March 6, Prime Minister Singh also declared that India would pursue a safeguards agreement with the IAEA that is “India-specific.” He also declared, “We have received commitments from the United States for the reliable supply of fuel to India for reactors that will be offered for safeguards. The United States has also reaffirmed its assurance to create the necessary conditions for India to have assured and full access to fuel for such reactors.”

To date, a definition of “India-specific” IAEA safeguards has not been provided. In addition, the nature of the U.S. fuel-supply assurances is not clear. While U.S. officials including Secretary of State Rice has testified that safeguards over nuclear facilities declared by India as civilian will apply in perpetuity, it is not evident that India agrees that the safeguards will apply permanently if foreign nuclear fuel supplies for its civil reactors are interrupted.

Therefore, it would be reasonable and prudent for Congress to require, as a condition for exempting India from the AEA section 123(a)(2) full-scope safeguards requirement, the President to certify that:

- An agreement between India and the IAEA has entered into force requiring the application of a safeguards agreement consistent with IAEA safeguards, principles, and practices in perpetuity for all “civil” nuclear facilities and associated nuclear material.

U.S. officials also claim that the nuclear cooperation proposal is valuable because it will, over time, bring a larger percentage of India’s nuclear facilities under safeguards. On March 6, Prime Minister Singh stated that India has decided to place under safeguards all future civilian thermal power reactors and civilian breeder reactors. Singh also said the Government of India retains the sole right to determine which of its future reactors are designated as civilian.

To help ensure that this pledge is carried out faithfully, it would be reasonable and prudent for Congress to require, as a condition for exempting India from the AEA section 123(a)(2) full-scope safeguards requirement, the President to certify that:

- India has provided credible assurances that all future electricity-producing nuclear reactors (including breeders) will be declared “civilian” and placed under safeguards.

Additional Protocol

As part of the July 18 Joint Statement, India committed to signing and implementing the Additional Protocol, which is designed to allow more extensive inspections by the IAEA of declared and undeclared nuclear facilities. As a state that is not legally recognized under the NPT as a nuclear-weapon state, the nature of the Additional Protocol that would be negotiated by India with the IAEA is not clear. While Additional Protocol agreements for non-nuclear-weapon states give the IAEA additional authority to visit and gather information on all declared and undeclared nuclear sites, such agreements for the recognized nuclear-weapon states are far more limited in scope.

Though the George W. Bush administration has proposed that only states that have signed the Additional Protocol be allowed to import equipment for their civilian nuclear programs,⁷ H.R. 4974 only requires the president to be able to determine that “India and the IAEA are making satisfactory progress toward implementing an Additional Protocol that would apply to India’s civil nuclear program.”

Therefore, it would be reasonable and prudent for Congress to require, as a condition for exempting India from the AEA section 123(a)(2) full-scope safeguards requirement, the President to certify that:

- India has signed and implemented an Additional Protocol to its IAEA safeguards for its civil nuclear facilities that allows the IAEA access to all declared civil nuclear facilities.

Nuclear Export and Procurement Practices

The July 18 Joint Statement recognizes that India has passed a new export control law and intends to harmonize its export control practices with those of the Nuclear Suppliers Group and the Missile Technology Control Regime (MTCR). Unfortunately H.R. 4974 only requires that the president should be able to determine that “India is ensuring that the necessary steps” are being taken to achieve and implement these objectives.

⁷ Remarks by the President on Weapons of Mass Destruction Proliferation, Washington, D.C., February 11, 2004.

This rather vague standard should and can be strengthened and clarified in ways that are consistent with existing U.S. law and international practices. Though India's adoption of a new export control law covering weapons of mass destruction and delivery systems is a positive development, a record of implementation of the law has not been established. And according to the State Department's own admission, it does not contain "catch all" controls to prevent the re-transfer of dual-use foreign technology and equipment.

Specifically, Congress should require, as a condition for exempting India from the AEA section 123(a)(2) full-scope safeguards requirement, the President to certify that:

- India has established and is successfully implementing a national nuclear export control system and is following nuclear procurement practices that meet the highest international standards and are fully consistent with NSG guidelines, including stringent rules and procedures banning unauthorized contacts and cooperation by personnel with nuclear expertise.
- India has provided credible assurances that it will not transfer enrichment or reprocessing technologies to other states.

Independent reports have documented that Indian nuclear organizations use a system that hires domestic or foreign non-nuclear companies to acquire items for these Indian nuclear organizations. Such procurement practices are also being employed for the Indian Department of Atomic Energy's secret gas centrifuge uranium enrichment plant near Mysore.⁸ These practices could contribute to onward proliferation and should be stopped.

India-specific or Country-neutral criteria?

Conditions such as those outlined above could be formulated in an "India-specific" manner (as the administration has proposed), or Congress could amend the AEA to establish new "country neutral" criteria for civil nuclear trade with states that never joined the NPT and do not accept full-scope IAEA safeguards, which would also include Israel and Pakistan. There are pros and cons to each of these approaches.

One can reasonably argue that a country-neutral approach would establish universal standards that apply to all states and provide a way for the three states that have never signed the NPT to more fully join the nonproliferation system and gain access to nuclear technology and fuel for peaceful purposes. This would help protect the United States against charges that it is seeking a double standard for its friends, while treating its foes differently. This might be more attractive to some of our international partners in the NSG.

But there is also a possibility that the reaction by some states would be quite hostile to such a development because some Middle Eastern states might perceive it as a backhanded way of extending legitimacy and nuclear benefits to Israel. Notwithstanding possible international reactions, a country-neutral approach would go against established U.S. law that countries seeking nuclear trade with the United States that don't meet the criteria set forth in the AEA should be judged on a case-by-case basis. To address this problem, the criteria set forth in a country-neutral approach could be made more stringent than those already codified in the AEA.

⁸ Testimony of David Albright, President of the Institute for Science and International Security, House International Relations Committee, October 26, 2005.

The minimum requirement for an acceptable country-neutral approach would be that only countries that have never signed the NPT are eligible to pursue nuclear cooperation on these grounds. Such a provision would be necessary to ensure that there is not an exodus from the NPT.

2. Maintain Common Sense Criteria for Possible Termination of Civil Nuclear Cooperation

Section 129 of the Atomic Energy Act provides a clear and objective list of seven types of actions that could trigger the possible termination of nuclear cooperation between the United States and another state.

Oddly, H.R. 4974 proposes to give the president the authority to waive all of Section 129. In its place H.R. 4974 maintains only one, albeit important, condition for continued U.S. nuclear cooperation: that India does not conduct another nuclear test explosion.

This approach is a mistake, in part, because it could set a terrible precedent for future agreements of nuclear cooperation and it would eliminate certain conditions for continued nuclear cooperation that are fundamentally in the United States' national security interest and that are vital to our credibility as a responsible nuclear trading partner.

As is the practice with other bilateral agreements for nuclear cooperation, Congress should also stipulate what actions, if undertaken by India, could trigger the termination of civil nuclear cooperation.

Triggers for possible termination of nuclear cooperation with India should track as closely as possible with Section 129 and should include:

- a. Termination or abrogation of IAEA safeguards by India;
- b. Material violation of IAEA safeguards by India;
- c. Any material violation of an agreement for nuclear cooperation with the United States (including a finding of reprocessing or enrichment of nuclear material subject to the agreement by India without U.S. consent);
- d. Continued production of fissile material for weapons purposes by India;
- e. A nuclear test explosion by India after May 1998;
- f. Finding that India has knowingly assisted or encouraged a non-nuclear-weapon state in activities involving source and special nuclear material having a direct significance for the manufacture of nuclear weapons, and has failed to take steps, which, in the President's judgment, represent sufficient progress toward terminating such assistance;
- g. Export of any nuclear technology, equipment, or materials by India or Indian entities that does not conform to NSG guidelines;
- h. Finding by the United States of unauthorized duplication or transfer of transfer of MTCR-controlled missile items by India; or
- i. Finding that India is not applying stringent physical protection, control, and accountancy measures to all nuclear weapons, nuclear facilities, source material, and special nuclear material in its territory.

Section 129 of the AEA requires termination of nuclear cooperation in the event of items "a," "b," "c," and "f" (above). Item "e" would be an India-specific update of an existing Section 129 provision. Items "g" and "h" would be new India-specific requirements based on the

commitments made in the July 18 Joint Statement. Item “i” is based on a requirement set forth in Section 123.

Furthermore, because the proposed nuclear cooperation is premised on more responsible Indian nonproliferation behavior, Congress should also require annual reports from the executive branch on India’s performance in each of the areas listed above. If India is reported to have taken any of these actions, all nuclear trade should be terminated.

3. Follow Normal Process for Consideration of Nuclear Cooperation Agreements

The AEA provides for the conclusion of agreements for nuclear cooperation with states that meet the requirements outlined in Section 123 (a) and for those, like India, that do not.

The AEA provides the president with the authority to waive any of the requirements for civil nuclear cooperation set forth in Section 123 (a) if: “... he determines that inclusion of any such requirement would be seriously prejudicial to the achievement of U.S. non-proliferation objectives or otherwise jeopardize the common defense and security.”

Such an “exempted” agreement for nuclear cooperation would require that both chambers of Congress approve the agreement for nuclear cooperation if it does not contain all of the Section 123 (a) requirements.

However, the administration has proposed through H.R.4974 that Congress treat the still-to-be-negotiated Section 123 agreement for nuclear cooperation as if India met all of the requirements, including allowing full-scope nuclear safeguards. If Congress agrees to this approach, the agreement would pass automatically within 90 days unless Congress passes a joint resolution of disapproval and Congress would lose its authority to review export licenses pursuant to the agreement.

Clearly, India is an exceptional nuclear case that does not currently meet U.S. nuclear trade standards. Any new agreement for nuclear cooperation with India should be treated accordingly. Therefore, I would strongly recommend that:

- Congress should preserve its existing authority and decide to review and consider the proposed Section 123 agreement for nuclear cooperation as an “exempt” agreement.

If such an agreement is, as advocates suggest, in the United States best interests, there should be no reason why it should not require approval from both chambers of Congress.

4. Consider Proposed AEA Amendments, Agreement for Nuclear Cooperation, and the Indian-IAEA Safeguards Agreements as a Package

The administration is proposing that Congress make the exemption for India before the agreement for nuclear cooperation and IAEA safeguards agreement are completed. Rather, Congress should defer action on any changes to the Atomic Energy Act until such time as the

administration has submitted the proposed U.S.-India section 123 agreement for nuclear cooperation.

Doing so will allow Congress to understand whether the Indian-IAEA safeguards agreement is consistent with IAEA safeguards standards, principles and practices and that it provides for the perpetuity of safeguards and that such perpetuity is not contingent on any assurances of supply.

There is reason to be concerned that the Section 123 agreement for nuclear cooperation with India may not conform with all relevant requirements of the AEA (except for the Section 123(a) (2) full-scope safeguards standard). According to published reports, India is pressuring the United States to drop key provisions in the agreement that are required by the AEA, such as the right of the United States to suspend peaceful nuclear cooperation if the recipient state conducts a nuclear test explosion (Section 123 (a) (4)). It is also possible that India may object to giving the United States prior consent rights with respect to the reprocessing, alteration in form or content, or enrichment of nuclear material that is subject to the U.S.-Indian peaceful nuclear cooperation agreement (Section 123(a)(5)).

5. Ensure That Proposed Changes to NSG Guidelines Do Not Undercut U.S. Laws

In the July 18 Joint Statement, President Bush pledged to seek India-specific exceptions to NSG guidelines adopted at the United States' urging in 1992 that restrict trade with non-nuclear-weapon states (including India) that do not accept full-scope IAEA safeguards.

Although U.S. officials insist that they continue to support the NSG, India-specific exemptions from NSG guidelines would erode the credibility of the NSG's effort to restrict legitimate peaceful nuclear trade only to those states that meet global nuclear nonproliferation and disarmament standards. The U.S. proposal could invite other nuclear supplier states to seek exemptions for their preferred nuclear trading partners that don't yet meet the NSG's standards and/or prompt nuclear supplier states to simply ignore the NSG's voluntary guidelines, as Russia did when it resupplied India's two light-water reactors at Tarapur earlier this year. (Russia had announced in December 2004 that it would not re-supply the Tarapur reactors but changed its position sometime after Bush and Singh announced their proposal for civil nuclear cooperation.)

In the days before a March 22-23 consultative group meeting of the Nuclear Suppliers Group in Vienna, the United States circulated a draft text that would create an India-specific exemption to NSG guidelines.

One of the most notable and troublesome features of the March 2006 U.S. proposal to the NSG is the weak and very ambiguous language outlining what steps India must implement in order to qualify for transfers of NSG trigger list items. In addition, section 4 of the U.S. proposal would allow individual NSG members to decide whether India is meeting these weak standards before they sell nuclear technology and materials (possibly including technologies the United States would not be willing to sell) to India.

Section 4 of the draft U.S. proposal to the NSG says in part:

“Participating Governments may transfer trigger list items and/or related technology to the safeguarded civil nuclear facilities in India (a State not party, and never having been a party, to the NPT) as long as the participating Government intending to make the transfer

is satisfied that India continues to fully meet all of the aforementioned nonproliferation and safeguards commitments, and all other requirements of the NSG Guidelines.”

Therefore, it would be prudent for Congress to get written and/or public assurances from the administration that:

- any changes to NSG guidelines to accommodate greater civil nuclear cooperation with India shall, at a minimum, meet the standards that shall be established in U.S. law, not otherwise undercut U.S. policy objectives, or put U.S. companies at a competitive disadvantage.

In addition, Congress should require that:

- proposed amendments to the AEA will become effective only if and when the Nuclear Suppliers Group (NSG) reaches a consensus decision to make necessary adjustments to its guidelines to accommodate greater civil nuclear cooperation with India.

These measures should not be controversial, especially given that Secretary of State Rice and other U.S. officials have publicly pledged that implementation of the U.S.-Indian nuclear cooperation proposal depends on NSG approval.

Conclusion

While I strongly support the goal of building upon the already strong U.S.-Indian partnership and assisting India’s efforts to deliver cleaner forms of energy for its growing population, I remain convinced that if Congress takes the appropriate steps, these goals can all be achieved without undermining core U.S. nuclear nonproliferation values and U.S. leadership efforts to prevent the proliferation of the world's most dangerous weapons.

The Arms Control Association is a non-profit, non-partisan membership organization established in 1971 to conduct research and public education on nuclear, biological, and chemical arms, as well as conventional weapons, and to promote effective arms control solutions. The Association publishes the monthly journal Arms Control Today.